(3)

No. 89-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,
v.

ROBERT L. CLARKE, OFFICE OF THE COMPTROLLER OF THE CURRENCY, and SECURITY PACIFIC NATIONAL BANK,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT SECURITY PACIFIC NATIONAL BANK'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals reasonably deferred to the Comptroller of the Currency's determination that, because a national bank's sale of its mortgage pass-through certificates is incidental to the express power to sell its mortgages, 12 U.S.C. §§ 24 (Seventh) and 371(a), the bank's activity is specifically authorized as part of the "business of banking" under section 16 of the Glass-Steagall Act and is not prohibited by that section's limitations on "the business of dealing in securities."

2. Whether the Court of Appeals correctly ordered the complaint dismissed, where the Comptroller of the Currency properly concluded that the bank's activity effecting the sale of its mortgage loans is authorized by 12 U.S.C. §§ 24 (Seventh) and 371(a) and is subject to the proviso to section 21 of the Glass-Steagall Act exempting from its prohibitions the sale of "obligations evidencing loans on real estate."

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption.*

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* Pursuant to Rule 29.1 of this Court, Respondent Security Pacific National Bank states that its parent is Security Pacific Corporation and that its subsidiaries (except wholly owned subsidiaries) are Hong Kong & Shanghai Insurance Co., Ltd., Security Pacific Bank, S.A., Security Pacific Capital Australia Limited, NDC Securities Limited, Broadgate Asset Management Limited, Security Pacific Asian Bank Limited, Security Pacific Private Capital (Asia) Limited, and China International Finance Limited.

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Respondent Security Pacific National Bank ("Security Pacific") opposes granting the petition of the Securities Industry Association ("SIA") for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Meskill, J., joined by Winter and Van Graafeiland, JJ.) is reported at 885 F.2d 1034. Citations to the decision of the Comptroller of the Currency and to the district court's opinion are set forth in the Petition.

JURISDICTION

Discretionary jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 8, 1989, rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves, and the court of appeals relied significantly upon, 12 U.S.C. § 371(a) (1988), which is not cited in the Petition but provides:

§ 371. Real estate loans

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation.

The case also involves sections 16 and 21 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (Seventh), 378(a)(1) (1988). Pertinent provisions of section 16—including the authorization to exercise "all such incidental powers as shall be necessary to carry on the business of banking"—and of section 21—including the proviso "[t]hat nothing in this paragraph shall be construed as affecting in any way such right as any bank . . . may otherwise possess to sell . . . obligations evidencing loans on real estate"—are set forth in Pet. at 77a-79a, although the proviso is neither cited nor even acknowledged in the Petition.

STATEMENT OF THE CASE

This is an action brought by SIA under the Administrative Procedure Act to challenge a twenty-page interpretive letter of the Comptroller of the Currency (the "Comptroller") dated June 16, 1987. The letter responded to a six-sentence inquiry from SIA concerning the legality of the sale by Security Pacific on February 23, 1987, of pass-through certificates representing interests in cer-

tain of the bank's mortgage loans. The Comptroller, who is the principal regulator of national banks, concluded that "the Bank's program, as described in the Prospectus and Prospectus Supplement dated January 23, 1987, is squarely based on long-standing precedent that is fully supported by applicable law and subsequent court decisions interpreting these laws." Pet. 76a. The Comptroller found Security Pacific's role consistent with "prudent banking practices" that contribute to "the maintenance of a safe and sound banking system." Pet. 63a.

The Comptroller's conclusions followed naturally from his determination ten years earlier that the sale of mortgage pass-through certificates "represent[s] the sale of an interest in bank assets, conventional mortgage loans," and that their sale is a "bona fide sale of assets" and "not issuing, selling or distributing securities on behalf of another issuer." Press Release and Letter of Robert Bloom, [1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 97,093, at 82,371 (Mar. 30, 1977) ("1977 Bank of America Letter").[1] In evaluating the earlier

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[1] In this case, Security Pacific placed certain of its mortgage loans in trust and received the certificates in exchange. The bank was paid for the mortgage loans only upon the bank's sale of the certificates, either to underwriters or to ultimate purchasers. Until the bank sold the certificates, it continued to own the mortgages for accounting, federal tax, and creditors' claims purposes. It is thus common ground that "[a] mortgage pass-through security represents an ownership interest in the underlying mortgage loans and . . . is treated as a sale of assets to investors." Askin & Lowell, *The Rating of Mortgage-Backed Securities* in *The Handbook of Mortgage-Backed Securities* 305, 311 (rev. ed. 1988) (F. Fabozzi ed.). "The sale of the mortgage-backed certificates transfers to the certificate holders the pro rata share of their equitable ownership in each of the mortgages in the 'pool.'" Rev. Rul. 77-349, 1977-2 C.B. 20, 21. *See* J. Peaslee & D. Nirenberg, *Federal Income Taxation of Mortgage-Backed Securities* 6 (1989).

transaction, in which an SIA member served as underwriter, the Comptroller concluded that the use of pass-through certificates as a means of selling mortgage loans is permissible under the statutory powers of national banks and would not violate the proscriptions of the Glass-Steagall Act. *Id.*

In the June 1987 letter at issue here, the Comptroller again concluded that "a national bank's issuance of mortgage-backed pass-through certificates evidencing ownership interests in its conventional mortgage assets, of the sort evidenced by the transaction in question, represents nothing more than the negotiation of evidences of debt and the sale of real estate loans, which is expressly authorized under 12 U.S.C. §§ 24 (Seventh) and 371(a)." Pet. 61a.[2] Alternatively, the Comptroller found the sale to be among a bank's "incidental powers . . . to carry on the business of banking," 12 U.S.C. § 24 (Seventh), following the stringent requirement of *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972), that an incidental power be " 'convenient or useful' to the perform-

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[2] In this regard and also elsewhere in the course of the letter, the Comptroller expressly cited and relied upon a long line of administrative precedents, which were included in the Administrative Record. A list of the cited decisions follows: Press Release and Letter of Robert Bloom, [1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 97,093 (Mar. 30, 1977); Letter from Charles B. Hall, [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,100 (Feb. 14, 1978); Letter from John G. Heimann, *id.* ¶ 85,116 (May 18, 1978); Letter from H. Joe Selby, *id.* ¶ 85,144 (Oct. 17, 1978); Letter from Paul M. Homan, *id.* ¶ 85,167 (Apr. 20, 1979); Letter from John M. Miller, *id.* ¶ 85,182 (July 31, 1979); Letter from Paul M. Homan, [1981-1982 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,213 (Feb. 1, 1980); Letter from Billy C. Wood, *id.* ¶ 85,275 (May 29, 1981); Letter from Brian W. Smith, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,421 (Apr. 12, 1983); Letter from Richard V. Fitzgerald, [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 84,015 (May 22, 1986); Letter from Robert L. Clarke to Senator Alfonse D'Amato (June 18, 1986).

ance of an expressly authorized banking power." Pet. 64a. Here, Security Pacific's sale of its mortgage pass-through certificates was found to be an incident of its express powers to negotiate notes and to sell mortgages. Pet. 64a-65a. The Comptroller concluded that "[b]ecause the sale of bank assets through this medium is authorized under the national banking laws, the prohibitions of the Glass-Steagall Act are inapplicable to this transaction." Pet. 65a. For these and other purposes, the Comptroller followed "[r]ecent court decisions" emphasizing "that the Glass-Steagall Act is not intended to bar national banks . . . from activity that is authorized under other provisions of the Act or the national banking laws." Pet. 71a (citations omitted).[8]

In determining unanimously to uphold the Comptroller's decision, the court of appeals recognized that it need not reach and decide each of the several alternative grounds relied upon in the Comptroller's letter. Citing 12 U.S.C. § 371(a), *supra* p. 2, the court affirmed that "[t]he Comptroller correctly concluded that [Security Pacific] has the express power under the national banking laws to sell its mortgage loans." Pet. 32a. The court then held that Security Pacific was authorized to sell its mortgage loans in pass-through certificate form as

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[8] In the course of the same discussion, the Comptroller observed that because *SIA v. Board of Governors*, 468 U.S. 137, 158 n.11 (1984), found "that the Glass-Steagall Act is not intended to affect the authority of commercial banks to conduct the business of banking[,] . . . the national banking laws, including Glass-Steagall, do not restrict the means by which this activity may be conducted." Pet. 69a n.13. *Cf.* Pet. 4.

As alternative grounds for decision the Comptroller also concluded both that the mortgage pass-through certificates are not Glass-Steagall "securities" for these purposes and that their sale by the issuing bank is not a prohibited "underwriting." Pet. 66a-73a. Further, the Comptroller determined that the bank's role in the transaction did not give rise to the "subtle hazards" associated with bank activities that violate the Glass-Steagall Act. Pet. 73a-75a.

part of its incidental powers. Like the Comptroller, the court found Security Pacific's "use of the pass-through certificate mechanism is 'convenient [and] useful in connection with the performance of' its power to sell mortgage loans," Pet. 34a, and therefore satisfied even the *Arnold Tours* requirement that the activity be incidental to " 'the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act,' " Pet. 33a (quoting *Arnold Tours*, 472 F.2d at 432).

Relying upon decisions of this Court and the courts of appeals, the court below endorsed the Comptroller's conclusion that because Security Pacific's activities were encompassed by Glass-Steagall section 16's power "to carry on the business of banking," 12 U.S.C. § 24 (Seventh), there could be no Glass-Steagall violation and there was no need to analyze the transaction further under section 21. *See* Pet. 34a-35a (citing *SIA v. Board of Governors*, 468 U.S. 137, 149 (1984) (*"Bankers Trust I"*); *Board of Governors v. Investment Co. Inst. ("ICI")*, 450 U.S. 46, 63 (1981); *SIA v. Board of Governors*, 807 F.2d 1052, 1057 (D.C. Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987) (*"Bankers Trust II"*)).

Like the Comptroller, the court of appeals also relied on the provisos to Glass-Steagall section 21, which provide, *inter alia*, "[t]hat nothing in this paragraph shall be construed as affecting in any way such right as any bank . . . may otherwise possess to sell . . . obligations evidencing loans on real estate." 12 U.S.C. § 378(a)(1). The provisos thus "clarify the relationship between sections 16 and 21 and support the Comptroller's view that section 21 cannot be read to prohibit [Security Pacific]'s activity, as it is permitted by section 16." Pet. 35a (citing *Bankers Trust II*, 807 F.2d at 1057-58; *SIA v. Board of Governors*, 839 F.2d 47, 56, 60-61 (2d Cir.), *cert. denied*, 108 S. Ct. 2830 (1988)).

SIA's Petition seeks review of the court of appeals' decision upholding the Comptroller's statutory interpretation and directing that SIA's complaint be dismissed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY UPHELD THE COMPTROLLER'S CONCLUSION THAT A BANK'S SALE OF ITS MORTGAGES AS PASS-THROUGH CERTIFICATES IS NOT PROHIBITED BY THE GLASS-STEAGALL ACT

The court of appeals correctly affirmed the Comptroller's carefully reasoned conclusions with respect to the meaning of the national banking laws, and no special circumstances are presented justifying further review by this Court. The court of appeals was faithful to this Court's prior opinions (including *Bankers Trust I*), and its decision is fully consistent with every decision of the several courts of appeals rendered since *Bankers Trust I*. There is thus no confusion to be clarified. The Comptroller's analysis, moreover, is supported by the Comptroller's own longstanding precedents and is not contradicted by other regulatory interpretations. The Comptroller recognized that banks' use of the pass-through medium is "important to the maintenance of a safe and sound banking system," Pet. 63a, and the decision of the court of appeals serves that important public interest, *see* Pet. 34a. There is no important new issue that deserves the attention of this Court.

The issue presented to the Comptroller, and ultimately to the court of appeals, was whether Security Pacific somehow violated the Glass-Steagall Act by selling pass-through certificates evidencing mortgage loans it had originated in the ordinary course of its mortgage lending business. The factual and legal analysis of both the agency and the court were thus focused directly and specifically on the powers of national banks to sell residential mortgages. SIA's far-flung speculations about banks

underwriting junk bonds, or indeed "investment securities," Pet. 12-13, simply do not bear on this case.

With respect to *this* case, the law is quite clear:

- National banks are expressly authorized to "sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation." 12 U.S.C. § 371(a) (1988).
- Glass-Steagall Act section 21 expressly provides "[t]hat nothing in this paragraph shall be construed as affecting in any way such right as any bank . . . may otherwise possess to sell . . . obligations evidencing loans on real estate." 12 U.S.C. § 378(a)(1) (1988).

Both the Comptroller and the court of appeals properly interpreted and relied upon these statutes—not even cited in the Petition—and correctly concluded that the Security Pacific transaction did not violate the Glass-Steagall Act.

A. The Decision Of The Court Of Appeals Is Consistent With, And Relies On, This Court's Holding That The Glass-Steagall Act Does Not Limit The "Business Of Banking," But Only The "Business Of Dealing In Securities"

The Glass-Steagall Act seeks to separate commercial banking from investment banking. The "principal provisions that demarcate the line separating commercial and investment banking" are sections 16 and 21, 12 U.S.C. §§ 24 (Seventh) and 378(a)(1). *Bankers Trust I*, 468 U.S. at 148. Although they approach the issue from different perspectives—section 16 from the commercial bank perspective, section 21 from the investment bank perspective—the two sections "seek to draw the same line." *Id.* at 149.

Common to the analyses of the court of appeals and the Comptroller was the recognition that the Glass-

Steagall Act was not intended to prohibit established and accepted banking practices. Section 16 of the Act authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). At the same time, "Section 16 limits the involvement of a commercial bank in the 'business of dealing in stock and securities [sic].'" *Bankers Trust I*, 468 U.S. at 148 (quoting § 24 (Seventh)). *See Board of Governors v. ICI*, 450 U.S. at 62 (section 16 "places a limit on the power of a bank to engage in securities transactions"). The Act's limitations thus concern the "business of dealing in securities." Practices that are integral to the "business of banking," in contrast, were not prohibited. *Bankers Trust I*, 468 U.S. at 159 n.11. Correspondingly, section 21 "surely was not intended to require banks to abandon an accepted banking practice that was subjected to regulation under § 16." *Board of Governors v. ICI*, 450 U.S. at 63 (footnote omitted). *See ICI v. Camp*, 401 U.S. 617, 624-25 (1971); *SIA v. Board of Governors*, 821 F.2d 810, 814-15 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1005 (1988).

Thus, although it may be correct that "[s]ection 16 flatly prohibits national banks from underwriting" certain securities, Pet. 2, it is not true that the Act prohibits activities that are part of the "business of banking." The Glass-Steagall Act's "system of flat prohibitions and prophylactic measures . . . cannot obviate the need to examine particular factual situations to determine on which side of the prohibitory line they fall." *Bankers Trust II*, 807 F.2d at 1067 (internal quotations and citations omitted).

Both the Comptroller and the court of appeals were correct, therefore, in deciding that it was sufficient, for Glass-Steagall purposes, that they consider first whether the challenged bank activity was part of the "business of banking" and not part of the "business of dealing in securities." As the court of appeals put it, "[a]ctivity

that falls within the 'business of banking' is not subject to the restrictions the latter part of section 16 places on a bank's 'business of dealing in securities and stock.' " Pet. 32a.[4]

B. Security Pacific's Sale Of Its Mortgage Pass-Through Certificates Was Part Of The "Business Of Banking"

As both the Comptroller and the court of appeals held, there can be no doubt that the sale of mortgage loans is part of the "business of banking," and SIA's petition does not challenge that holding. It is now firmly established by statute that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency . . . ." 12 U.S.C. § 371(a). *See* Pet. 32a-33a.[5]

Because the sale of the bank's mortgage loans is expressly authorized by 12 U.S.C. §§ 24 (Seventh) and 371(a), the Comptroller concluded that their sale in certificate form is also authorized as " 'convenient or useful' to the performance of an expressly authorized banking power," Pet. 64a; it makes possible the sale of the mortgages, which "serves specific *banking* purposes," *id.* 62a (emphasis added). The court of appeals was persuaded by the Comptroller's analysis "that [Security Pacific]'s 'incidental powers' authorized its activity in the trans-

[4] It has long been accepted that certain transactions involving "securities" may nevertheless be part of the "business of banking" and not "dealing in securities." *See First National Bank v. National Exchange Bank*, 92 U.S. 122, 128 (1876). See also the IRA cases, discussed *infra* page 14.

[5] The authority to sell mortgages long predates the statute. *See First National Bank of Hartford v. City of Hartford*, 273 U.S. 548, 560 (1927); *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 352-54 (1926); 38 Op. Att'y Gen. 258, 263 (1935); Consolidated Issue, Bull. of the Comptroller of the Currency, at 29, ¶ 1910 (Jan. 1, 1938).

action at issue here," Pet. 34a, and therefore considered there to be "no need to address the Comptroller's alternative finding that the activity . . . fell within the bank's express power to sell mortgages," *id.* at 34a n.7.

Contrary to SIA's assertions, Pet. 14-17, this analysis is fully consistent with this Court's decisions in *Bankers Trust I* and *ICI v. Camp.* In *Bankers Trust I*, the Court had occasion to address whether commercial paper may be a Glass-Steagall "security" because the bank concededly was *not* engaged in the business of banking (specifically the discounting of notes). 468 U.S. at 158 n.11. Similarly, in *Camp*, the "securities" issue arose in the context of a bank selling interests "in the business of buying, holding, and selling stocks for investment." 401 U.S. at 635. SIA ignores the threshold question, which is dispositive of this case, regarding "the role of the bank in the transaction." *Bankers Trust I*, 468 U.S. at 154. In contrast, the Comptroller and court of appeals expressly focused on the bank's role, which was to engage in the sale of the bank's mortgages, an expressly permitted activity.[6]

SIA's petition does not challenge the court's holding that the sale of mortgages through the medium of pass-through certificates is an incidental banking power. Instead, SIA sets up a straw man by asserting that the court of appeals permitted any and all "securities activities [that] are 'convenient and useful' to banking." Pet. 8. *See id.* i, 12, 13, 15, 16, 17, 20. Rather, the court of appeals took the very narrow view that the Security Pacific transaction was incidental to " 'the performance

[6] Further, the sale makes possible additional lending, which is at the heart of the commercial banking business, and does not displace the bank from its role as "prudent lender," 468 U.S. at 158. Moreover, "the bank is selling interests in its own assets rather than the securities of a third party issuer." Pet. 69a n.13. The concerns underlying the *Bankers Trust I* and *Camp* decisions therefore are not implicated. *See* Pet. 38a-41a (court of appeals); 68a n.13 (Comptroller).

of one of the bank's *established activities* pursuant to its *express powers* under the National Bank Act,' " the sale of its mortgage loans. Pet. 33a (quoting *Arnold Tours*, 472 F.2d at 432) (emphasis added).[7]

Premised on its misreading of the court's holding, SIA argues, mistakenly, that the court of appeals ignored the language and legislative history of the Glass-Steagall Act. Pet. 6-7. To the contrary, the court relied on the fact that the Act itself confirms that the bank's activity falls on the banking side of its prohibitory line. In recognition of existing banking powers, the second proviso to Glass-Steagall section 21 makes clear that sales of "obligations evidencing loans on real estate" are not subject to the proscriptions of section 21 or, necessarily, section 16. 12 U.S.C. § 378(a)(1). SIA cannot dispute that the language of this proviso by its terms applies to the sale of mortgage pass-through certificates at issue here: they are "obligations" that are the equivalent of and "evidenc[e] loans on real estate." SIA instead ignores the proviso, as well as the Comptroller's (Pet. 67a n.12, 73a) and the court of appeals' (Pet. 35a-36a) reliance on it.[8]

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[7] Indeed, the court held that "securities activities," but not the "business of banking," are limited by the Glass-Steagall Act. Because the sale of mortgage loans is part of the "business of banking," the court of appeals concluded that the Act did not bar the activity. *See* Pet. 32a. Contrary to SIA's assertions, banks have extensive securities powers—both express and incidental, *e.g.*, 12 U.S.C. § 24 (Seventh). The Glass-Steagall Act addresses the limits of permissibility of the latter activities that are part of the "business of dealing in securities." *See supra* pp. 8-10.

[8] The history of the real estate proviso demonstrates that the Comptroller's and court of appeals' reliance on it was well placed. In May 1934, the Federal Reserve Board concluded that "mortgage notes" are not "bonds, debentures, notes, or other securities" within the meaning of Glass-Steagall sections 20 and 32. *Obligations Secured by Real-Estate Mortgages as "Securities" Under Various Sections of the Banking Act of 1933*, 20 Fed. Res. Bull. 302, 302 (1934). The Board also concluded that "it is not possible to lay down any general rule as to whether or not . . . obligations secured

C. SIA's Additional Arguments Do Not Merit Review

The question ultimately is whether the Comptroller's interpretation is lawful. The Comptroller thoroughly analyzed and refuted each of the issues raised. In these circumstances, this Court would be "duty bound . . . to give 'great weight' to that interpretation," *ICI v. Conover*, 790 F.2d 925, 932 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986), and sustain his conclusion as "based on a permissible construction of the statute," *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (footnote omitted). *See Clarke v. SIA*, 479 U.S. 388, 403-04 (1987); *ICI v. Camp*, 401 U.S. at 626-27.[9]

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by mortgages" (apart from mortgages) are such securities, leaving the treatment of each such obligation to be determined "according to the facts involved therein." *Id.* The proviso was enacted in 1935 to eliminate any doubt that banks can exercise the rights they have to sell mortgage obligations without risk of violating section 21. *Banking Act of 1935: Hearings Before a Subcommittee of the Committee on Banking and Currency, United States Senate, Seventy-fourth Congress, First Session, on S. 1715 and H.R. 7617* at 139-40 (1935) (*"1935 Hearings"*).

As the 1934 quotation above demonstrates, the Board's longstanding interpretation of the Glass-Steagall Act does not conflict with the Comptroller's. *See* Pet. 21. Neither is the Board's *Citicorp* order, 73 Fed. Res. Bull. 473 (1987), *aff'd*, 839 F.2d 47 (2d Cir.), *cert. denied*, 108 S. Ct. 2830 (1988), in conflict with the Comptroller's letter. Pet. 13-14, 21. The Board there had to decide the extent to which non-bank subsidiaries of bank holding companies may underwrite instruments issued by third parties. The Board did *not* analyze the question presented here: whether a national bank may sell its own mortgages by means of pass-through certificates. The Comptroller devoted 20 pages to that subject and, in contrast to the facts before the Board, "underscore[d] the point that . . . [t]he Bank is not in this transaction selling securities of other issuers." Pet. 68a. There are thus no anomalies or conflicts between regulators upon which to premise anything less than the great deference due to the Comptroller.

[9] SIA's strategy of litigating in alternative jurisdictions to try to develop precedent favorable to it belies its suggestion that the court of appeals' decision has broader significance because of that court's relationship with the nation's financial markets, Pet. 12. In 1988 in

SIA assumes without analysis that Security Pacific engaged in an "underwriting" of "securities" because those terms were used in the prospectus for the pass-through certificates. *E.g.*, Pet. 3. SIA's argument-by-label cannot withstand even casual scrutiny. That Security Pacific's certificates were publicly registered with the Securities and Exchange Commission (the "SEC") "does not make them 'securities' under section 16 of the Glass-Steagall Act." Pet. 41a. The "IRA cases," *ICI v. Conover*, 790 F.2d at 931, 933-34, 936; *ICI v. Clarke*, 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986); *ICI v. Clarke*, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986), for example, emphatically show that the form of a transaction—and specifically the public sale of SEC-registered certificates created by pooling assets—does not give rise to a Glass-Steagall violation or create a Glass-Steagall "security" if the substance of the transaction is, as here, permitted as part of the business of banking. Because a bank is expressly authorized to sell its mortgage loans to the public, it may sell them through the medium of pass-through certificates. As was true of the trust assets in the IRA cases, the fact that the mort-

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the Second Circuit, for example, SIA lost its challenge to the Federal Reserve Board's permitting special subsidiaries of bank holding companies to underwrite certain types of securities. *SIA v. Board of Governors*, 839 F.2d 47 (2d Cir.), *cert. denied*, 108 S. Ct. 2830 (1988). Contemporaneously, SIA brought (and lost) an action in the District of Columbia Circuit to challenge a separate Board authorization for such subsidiaries to underwrite commercial paper. *See SIA v. Board of Governors*, 847 F.2d 890 (D.C. Cir. 1988). SIA's decision to bring this action in the Second Circuit followed a ruling adverse to SIA in the D.C. Circuit relating to the scope of the Glass-Steagall Act's underwriting prohibition. *See Bankers Trust II*, 807 F.2d 1052. *Amicus curiae* ICI has followed a similar strategy, bringing simultaneous challenges in several different jurisdictions concerning the same legal issues. *See ICI v. Clarke*, 793 F.2d 220 (9th Cir.), *cert. denied*, 479 U.S. 939 (1986); *ICI v. Conover*, 790 F.2d 925 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986); *ICI v. Clarke*, 789 F.2d 175 (2d Cir.), *cert. denied*, 479 U.S. 940 (1986).

gage loans were pooled and registered with the SEC to effect their sale did not give rise to a Glass-Steagall "security." *See* Pet. 66a (Comptroller's discussion of IRA cases), 37a-38a (court of appeals' discussion).[10]

Further, contrary to SIA's assertion, Pet. 12-13, the court of appeals did not authorize "underwriting" or any other activity prohibited by the Act. Section 21 limits bank involvement in the public sale of third-party instruments.[11] Section 16 does no more. *See Bankers*

[10] SIA's arguments based on legislators' statements and secondary commentary do not address the facts and circumstances of this case. Senator Bulkley and Rep. Bacon, Pet. 11, were concerned that banks not be permitted to underwrite corporate bonds to raise funds for the corporation to repay loans from the bank. *See* 75 Cong. Rec. 9912 (1932). Indeed, Sen. Bulkley sponsored the section 21 proviso to protect the power of banks to sell "obligations evidencing loans on real estate." *See* 78 Cong. Rec. 12,056-57 (1934); *1935 Hearings, supra* note 8, at 139-40. Correspondingly, the obscure secondary sources SIA cites, Pet. 11 n.14, had nothing to do with the development of the Glass-Steagall Act and and cannot substitute for legislation or legislative history.

The consistency of the court of appeals' decision with the IRA cases and with the other appellate decisions rendered since *Bankers Trust I* is ample proof that the decision below "will [not] be the source of substantial confusion." Pet. 17. Whether there will be "consequent litigation" following this case, *id.*, will depend upon factors other than whether this Court grants review in this case, including SIA's recently announced "plan to enable banks to reenter a range of securities businesses . . . [and] effectively to nullify the [Glass-Steagall] Act." Wall St. J., Dec. 4, 1989, at C1.

[11] Section 21 prohibits "issuing, underwriting, selling, or distributing" securities. *SIA v. Board of Governors,* 468 U.S. 207 (1984) ("*Schwab*"), considered virtually the identical list in section 20—"issue, flotation, underwriting, public sale, or distribution," 12 U.S.C. § 377. Following "the familiar principle of statutory construction that words grouped in a list should be given related meaning," the Court concluded that section 20's list of terms "should be read to refer to the underwriting activity" of which each is a part. 468 U.S. at 218 (internal quotes omitted). The "underwriting" process is triggered only by the purchase of securities from a third-party issuer, *see id.* at 217 n.17; *SIA v. Board of Governors,* 821

Trust I, 468 U.S. at 149; *Bankers Trust II*, 807 F.2d at 1057. Accordingly, the Comptroller correctly determined that the prohibitions of the Act relate to activities "with respect to securities issued by others," Pet. 69a, which is not this case, *id.* 68a-69a.[12] In this respect, the Comptroller followed the analysis applied to the very first offering of mortgage pass-through certificates by a national bank in 1977: the bank "is not issuing, selling or distributing securities on behalf of another issuer. The securities represent the sale of an interest in bank assets, conventional mortgage loans." 1977 Bank of America Letter, [1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 97,093, at 82,371.[13] Because Security Pacific is permitted to sell its conventional mortgage loans, it may sell the "securities" that are the equivalent of those mortgages.[14]

F.2d at 814, which is not present here. Because the bank is the owner of the mortgage loans being sold, moreover, the bank takes on no third party risk.

[12] It is thus flatly wrong for SIA to assert that "[t]he opinion expressly permits banks to act as underwriter of all mortgage backed securities. . . ." Pet. 12.

[13] The permissibility of the Comptroller looking through the form of a transaction to assess its substance is well established. *See, e.g., American Ins. Ass'n v. Clarke*, 865 F.2d 278, 281-84 (D.C. Cir. 1989); *M&M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377, 1382-83 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

[14] Nor is SIA correct to suggest that the Comptroller somehow previously had determined that a bank may not sell pass-through certificates representing its own mortgages. Pet. 20-21. The Comptroller's prior "investment securities" letter cited by SIA, Pet. 4, 21, concerned only the ability of a bank to purchase a third-party's certificates, just as did the contemporaneous determination that such certificates could, in the alternative, be purchased as "real estate loan participations." *See* [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,082 (Dec. 12, 1977); *id.* ¶ 85,100 (Feb. 14, 1978). The June 1987 letter at issue here, of course, did not address a bank's powers with respect to a third party's certificates,

The desperation of SIA's petition is apparent from its claim that, by deferring to the Comptroller, the court of appeals' opinion somehow implicates separation of powers concerns. Pet. 17. SIA is hardly in a position to complain that the June 1987 letter is an "*ad hoc* regulatory determination by the Comptroller," *id.* 20, when SIA *requested* that determination. More fundamentally, this Court long ago held that "[i]t is settled that courts should give great weight" to the Comptroller's "deliberative conclusions" as to the meaning of the Glass-Steagall Act. *ICI v. Camp*, 401 U.S. 617, 626-27 (1971). *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

Nor was there any reason for the court to have pursued the red herrings SIA raised concerning legislative activity subsequent to enactment of the Glass-Steagall Act. None dealt with "the specific conduct and instruments at issue" in this case, Pet. 20, which involves a bank's sale of its own originated mortgage loans through the medium of pass-through certificates. As demonstrated at length in briefs to the court of appeals, later amendments permitted the purchase, sale, and underwriting of third-party securities and securities that were not the equivalent of the bank's mortgage loans, or were added to make certain that no extrinsic prohibition was read into the Glass-Steagall Act. In every instance they were added by Congress to enhance, not restrict, the secondary market for mortgage loans and bank involvement in that market. None negates the fact that Congress has acknowledged the power of banks "to sell . . . obligations evidencing loans on real estate," 12 U.S.C. § 378(a)(1).

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but rather whether a bank could sell its own mortgages in the pass-through form. With respect to that issue, the Comptroller had already determined, prior to the "investment securities" letter SIA cites, that the selling bank had engaged in a sale of assets, not a sale of securities. 1977 Bank of America Letter, [1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 97,093, at 82,371. There was thus no reason for the Comptroller to have addressed the "investment securities" letter in the June 1987 letter, nor did SIA bring it to his attention in its six-sentence request for a ruling.

CONCLUSION

For the foregoing reasons and those presented in the Comptroller's Brief in Opposition, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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